No. 421

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

COMMISSIONER OF INTERNAL REVENUE, Petitioner

v.

NORBERT H. WIESLER

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNTED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

CITATIONS

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This brief is filed by Norbert H. Wiesler in opposition to the Petition for a Writ of Certiorari which has been filed in this Court by the Commissioner of Internal Revenue. The parties will hereinafter be referred to as "Commissioner" and "Wiesler".

QUESTIONS PRESENTED

We believe that with respect to the real issue presented —as distinguished from the application of the rule of *Dobson* v. *Commissioner*— the Commissioner has not

correctly stated the question, and we have accordingly restated the questions presented as follows:

1. Whether review of the Tax Court's decision is restricted by *Dobson* v. *Commissioner*, 320 U.S. 489.
2. Whether, in the absence of a governing Treasury regulation, the Tax Court correctly decided that a taxpayer engaged in the business of trading in securities is entitled to deduct as business expenses amounts paid by him in lieu of dividends on borrowed stock used to cover short sales, under Section 23 (a) of the Revenue Acts of 1936 and 1938 and of the Internal Revenue Code.

STATEMENT OF THE CASE

We accept the Statement of Facts in the petition (pp. 2-5).

INTRODUCTORY STATEMENT

In the petition herein the Commissioner informs the Court that he relies on the reasons presented in his petition for a writ to the Ninth Circuit in the case of *Commissioner* v. *F. A. Wilson*, No. 420, filed on the same date.

In the *Wilson* case the Circuit Court ruled directly on the merits, holding that the questioned payments were deductible as business expenses, and also held that a review of the Tax Court's decision was restricted by the

Dobson case. In the *Wiesler* case the Circuit Court, although indicating clearly its agreement with the Tax Court's conclusion (Pet. p. 6), rested its decision on the ground that the Tax Court's decision should be affirmed on the basis of the *Dobson* case.

We are informed that counsel for the taxpayer in the *Wilson* case is not filing a brief in opposition to the petition for a writ. For that reason, and since the questions presented by the two cases are identical, we ask that this brief be considered by the Court in its action on both petitions.

REASONS FOR DENYING THE WRIT

1. The Court below correctly affirmed the Tax Court on the authority of Dobson v. Commissioner.

The Commissioner argues against the application of the *Dobson* case on the grounds that the decisions of the Tax Court in these cases provide "a rule of general applicability", and that the Circuit Court's conclusions as to the application of *Dobson* conflict with the rationale of certain later decisions by this Court (Wilson Petition, p. 6). The rule prescribed by the decisions in these cases has no more "general applicability" than does the rule prescribed in the *Dobson* case. That the *Dobson* case involves a rule of general applicability is demonstrated by the numerous cases decided on the basis of the tax benefit rule, in which the Tax Court's decision in *Dobson* v. *Commissioner*, 46 B.T.A. 770, is cited as authority. See, e.g., *John R. Gibson, Jr.*, T. C. Memo.

Op., 12/31/43, P-H Para. 43,530; *Estate of Harriet Ankeny,* T. C. Memo. Op., 2/25/44, P-H Para. 44,052; *W. T. Morris,* T. C. Memo. Op., 1/3/44, P-H Para. 44,001. Thus, if the Commissioner would exclude cases involving a rule of "general applicability" from the ambit of *Dobson,* logically he must exclude the *Dobson* case, itself!

The questions presented in the three cases are not fundamentally different. The question in *Dobson* was whether certain receipts represented taxable income or a return of capital, and in these cases the question is whether certain expenditures are deductible expenses or capital in nature. Since the former was held by the Supreme Court in *Dobson* v. *Commissioner,* supra, to be "only a question of proper tax accounting", hence not subject to review, it would follow that the question obtaining in the instant cases would also be a question of proper tax accounting, likewise not subject to review.

The cases cited by the Commissioner in the petition in No. 420 (p. 6) in which this Court reviewed decisions of the Tax Court are clearly distinguishable. In *Trust of Bingham* v. *Commissioner,* 325 U.S. 365, and *Crane* v. *Commissioner,* 331 U.S. 1, the question turned on the meaning of specific words found in the statute. In *McWilliams* v. *Commissioner,* 331 U.S. 694, the question was whether a certain section of the statute, limiting the deductibility of losses, applied to the taxpayer's sale of securities. In *John Kelly Company* v. *Commissioner,* 325 U.S. 365, this Court reversed the Court of Appeals and affirmed the Tax Court on the authority of *Dobson.*

2. The case was correctly decided below.

There has never been a Treasury regulation governing the treatment for tax purposes of the payments here involved, as was the case in *Helvering* v. *Winmill*, 305 U.S. 79, and *Spreckels* v. *Helvering*, 315 U.S. 626. The Commissioner, however, says that the decision below reverses "a long established administrative practice which has consistently required that these substituted dividend payments be added to the cost basis of the covering securities." We challenge the correctness of that statement. Wiesler's tax history demonstrates its incorrectness. In a proceeding involving his taxes for earlier years (42 B.T.A. 1477, P-H B.T.A. Memo. Dec. Para. 40,379, July 17, 1940) Wiesler had deducted identical payments as business expenses. Although his gain or loss on short dealings in stock were in issue, the Commisisoner in that proceeding did not question his right to deduct as business expenses his payments equivalent to dividends on borrowed stock. It seems apparent that following the decision in *Dart* v. *Commissioner*, 74 F (2d) 845 (1935), the Commissioner abandoned his prior administrative practice and resurrected it only after the decision in *Helvering* v. *Wilmington Trust Company*, 124 F (2d) 156 (1941).

There is no valid analogy between payments on borrowed stock and purchase and selling commissions such as were involved in *Helvering* v. *Winmill*, supra, and *Spreckels* v. *Helvering*, supra. The payments involved here represent carrying charges and closely resemble

the payment of interest on a business loan which is clearly deductible under Section 23 (a). In *Deputy* v. *DuPont*, 308 U.S. 488 (1940), this Court, while denying DuPont the right to deduct such payments as business expenses, rested its decision on the fact that the payments were not related to any trade or business carried on by DuPont. In distinguishing *Dart* v. *Commissioner* this Court said "Thus, it has been held that one who is an active trader in securities might take as deductions *carrying charges* on short sales since selling short was common in that business." (Italics supplied.)

We submit that the question was correctly decided below on the merits, and that the Circuit Court in the *Wilson* case reached the correct result. The correctness of its decision is clearly demonstrated by the following excerpt from its opinion (Rec. No. 420, p. 73):

> "A 'short' sale of stock, such as we have in the present case, entails a *borrower* and a *lender* of stock, the borrower being the debtor to the lender. As heretofore stated, for any period during which the shares borrowed by the short dealer have not been replaced with the lender, the contract provides that the lender must be reimbursed in an amount equivalent to the dividends declared on the stock loaned while the lender is out of possession. See Provost v. United States, 269 U.S. 443, 450, 452, supra.
>
> "Here the payments under discussion, which were made by the borrower to the lender, reflect amounts representing the equivalent of the dividends declared on the borrowed stock, during the time that the borrowed shares were not replaced. This closely resembles the payment of interest on a business loan which has been held to be deduct-

ible under Section 23 (a) Internal Revenue Code, supra, as a business expense.

"It has been said that the designation as 'interest' of an amount paid or accrued during the taxable year is contingent upon its having some relationship to indebtedness. Commissioner of Internal Revenue v. Park, 38 B.T.A. 1118, aff'd. 113 F (2d) 352. 'Indebtedness' as used in the revenue acts has been defined as something owed in money which one is unconditionally obligated or bound to pay, the payment of which is enforceable. Gilman v. Commissioner, 18 B.T.A. 1277, affirmed 8 Cir., 53 F (2d) 47, 80 A.L.R. 209. The payment of the dividend here represents a sum of money unconditionally owed by the borrower to the lender of stock; it arises out of the relationship of debtor and creditor and is a customary expense in a 'short' sale incident to obtaining and using the stock. It is ordinary and necessary in this type of transaction."

3. There is no real conflict below requiring review by this Court.

The *Wilmington Trust Company* and *Levis Estate* cases were both decided before the decision of this court in the *Dobson* case. Since the rule of Dobson is applicable to this case, the conflict among the circuit courts is more apparent than real. The decision of the Circuit Court in *Helvering* v. *Wilmington Trust Co.*, supra, does not serve as a precedent since it was reversed on other grounds by this court. The continued adherence of the Tax Court to its views on the issue shows independent exercise of its judgment and demonstrates that there is a rational basis for its conclusions. The most that can be said is that

there is a reasonable difference in legal opinion respecting the correct income tax treatment of the questioned payments. Since the decision by the Court of Appeals for the Second Circuit in the *Levis Estate* case, that court has taken the position that such a reasonable difference in legal opinion is to be resolved in subsequent cases in favor of the ruling of the Tax Court. *Brooklyn National Corporation* v. *Commissioner,* 157 F (2d) 450, 452.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

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